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Supreme Court of the United States

October Term, 1954

No. 530

LEROY SMALLS, CHARLES BRIGHT AND EVA G. MITCHEL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN MITCHEL, DECEASED, PETITIONER,

Versus

ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on November 8, 1954.

OPINION BELOW

The opinion of the Court of Appeals (App. 9-11) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1954 (App. 8). Petition for rehearing was denied on December 9, 1954. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254 and 45 U.S.C. 51, 56.

QUESTION PRESENTED

In an action under the Federal Employers' Liability Act is it a question for a jury to decide whether or not an employer is negligent in sending employees on a dark night in the course of their employment to wait for a train on a highway which the employer knew was traveled and unlighted, thus creating the likelihood that such employees would be struck by the automobile of a third person as in fact occurred, without making reasonable provision against it?

STATEMENT

The instant cases, three in number and consolidated for trial and on appeal, were brought against the respondent, Atlantic Coast Line Railroad Company, under the Federal Employers' Liability Act, 45 U.S.C., 51, to recover damages for negligence in failing to provide the colored employees herein a safe place to work in that they were sent by the railroad on a dark night to wait for a train on an unlighted traveled highway crossing the train tracks where they were struck by the automobile of a third person, the employer being aware of the conditions which created a likelihood that the employees would be struck by an automobile just as in fact occurred.

The jury returned verdicts for Fifteen Hundred ($1,500.00) Dollars and Two Thousand ($2,000.00) Dollars in two cases involving personal injuries and a verdict of Four Thousand One Hundred Sixty-six ($4,166.00) Dollars in one involving the death of the injured person.

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Upon appeal, the Court below reversed the judgments and remanded the cases to the District Court with directions to enter judgments for the defendant. Petition for rehearing was filed by the petitioners (App. 12) and denied by the Court below on December 9, 1954.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accord with the applicable decision of this Court:**—The decision in the Court below is in direct conflict with the holding by this Court in *Lillie v. Thompson,* 332 U. S. 459, that it is a question for the jury to determine whether an employer, under the Federal Employers' Liability Act, is liable for injuries to an employee resulting from the negligence of a third person, where the employer is aware of conditions which create a likelihood that the employee would be injured by the act of the third person and fails to make reasonable provision against it.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:**—The decision of the Court below in concluding that the respondent railroad company was not negligent deprives the petitioners of their right to trial by jury under the 7th Amendment to the Constitution of the United States. In its undue invasion of petitioners' constitutional rights, the decision of the Court below is in conflict with numerous decisions of this Court establishing the jury as the sole arbiter of disputed issues of fact.

That an appellate court is confined to an examination of the record merely to determine whether there was sufficient evidence to warrant submitting the issue to the jury in cases where the evidence is conflicting, has long been the established rule of judicial review; and the depriva-

tion of a constitutional right by the violation of this fundamental rule has many times been made the basis for granting writs of certiorari by this Court. *Moore v. Chesapeake and Ohio Railroad Co.*, 340 U. S. 573; *Carter v. Atlanta and St. Andrews Bay R. R. Company*, 338 U. S. 340; *Wilkerson v. McCarthy*, 336 U. S. 53; *Myers v. Reading*, 331 U. S. 447; *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649; *Lavender v. Kurn*, 327 U. S. 645; *Jesionowski v. Boston and Maine R. R.*, 329 U. S. 452; *Tennant v. Peoria and Perkin Union R. R.*, 321 U. S. 29; *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350; *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54.

The evidence of record shows that the respondent railroad company directed the colored employees herein in the course of their employment to wait for a train on an unlighted traveled highway on a dark night and that while standing on the highway they were struck by the automobile of a third person. Obviously, a traveled highway is a dangerous place on a dark night for anyone to wait for a train, particularly the employees herein who were of the colored race and thus could not have been as readily seen by motorists as those of the white race. The evidence is also clear that the respondent railroad company was aware of the foregoing conditions or circumstances. Under the foregoing facts, whether the railroad was negligent in discharging its duty to provide a safe place to work is a question to be determined by the jury. *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350. The questions of whether the danger to the employees was foreseeable and whether the railroad had a duty to make reasonable provisions against it, were certainly for the jury. This Court so held in a case factually similar to the instant one, *Lillie v. Thompson, supra.*

Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for the jury,

invaded the province of the jury, contrary to the rights of petitioners under the 7th Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY HAMMER,

HENRY H. EDENS,

JAMES P. HARRELSON.

Attorneys for Petitioners.

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DECISION OF COURT OF APPEALS

(Argued October 6, 1954. Decided November 8, 1954.)
Before PARKER, Chief Judge, DOBIE, Circuit Judge, and HOFFMAN, District Judge.

Douglas McKay (McKay & McKay on brief) for Appellant, and Henry H. Edens (Henry Hammer and James P. Harrelson on brief) for Appellees.

PARKER, Chief Judge:

This is an appeal from judgments for plaintiffs in three actions to recover damages from the Atlantic Coast Line Railroad Company under the Federal Employer's Liability Act. The three cases were consolidated in the court below and heard before a jury, which returned verdicts for $1,500.00 and $2,000.00 in two cases involving personal injuries and a verdict for $4,166.00 in one involving the death of the injured person. The case arose out of injuries inflicted upon employees of the railroad company by an automobile with which the company had no connection, while they were standing at a crossing at Jacksonboro, S. C., waiting to be picked up by one of the company's passenger trains to be carried to Florence, S. C., where they were to attend a safety meeting which the company was holding for its employees. The case was submitted to the jury on the theory that the employees were protected by the Federal Employer's Liability Act while on their way to attend the meeting and that there was evidence in support of the contention of plaintiffs that the company was guilty of negligence in failing to provide them a safe place to work in that it had not lighted the crossing at which they were standing.

There is evidence that the company was holding a safety meeting for its employees at Florence on Saturday March 28, 1953, which the employees here were invited but not required to attend, and at which various matters affecting the safety of work were to be discussed. The employees, who were track repairers or "section hands,"

were not required to work on Saturdays but were requested by the company to attend this meeting. They were not paid for the time spent in attendance, but the company furnished them free transportation to attend and provided them food while there. The section hands in the vicinity of Jacksonboro were told that one of the company's fast trains would stop for them there around four o'clock on Saturday morning and about fourteen of them were assembled there about a quarter of an hour before that time. They were standing on the crossing where the state highway crosses the railroad tracks, when an automobile driven by one Cobb, who was not employed by nor in any way connected with the company, ran into them and inflicted injuries, resulting in the death of one of them, for which the actions for damages are brought. The crossing at which they were standing was about 200 yards distant from the station at Jacksonboro and there were no lights either at the station or at the crossing. The train which was to pick them up was not scheduled to stop at Jacksonboro, which was a mere flag station, but was ordered to stop there on the morning in question so that they might board it and go to Florence to attend the safety meeting.

On these facts, we think that the court below was correct in holding that the employees on their way to attend the safety meeting were covered by the provisions of the Federal Employer's Liability Act. They were attending the meeting as employees of the company and at its request for purposes connected with their employment in interstate commerce. We think that this was sufficient to bring them within the coverage of the act. *Healy v. Penn. R. Co.*, 3 Cir. 184 F. (2d) 209, certiorari denied 340 U. S. 935, rehearing denied 341 U. S. 912; *Mostyn v. Delaware, L. & W. R. Co.*, 2 Cir. 160 F. (2d) 15, certiorari denied 332 U. S. 770. And see also *Thompson v. Eargle*, 4 Cir. 182 F. (2d) 717.

We do not think, however, that there is any evidence of negligence on the part of the company to sustain a recovery by plaintiffs. It appears that the crossing at which the employees had congregated was 200 yards distant from the station. They were not ordered or invited by the

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company to stand in the highway at the crossing, and we know of no principle upon which the company could be held guilty of negligence in not lighting it. Their injuries resulted, not from any negligence of the company, but from their own negligence or the negligence of a third person, for whose acts the company was in no way responsible. Plaintiffs rely upon the decision in *Lillie v. Thompson*, 332 U. S. 459, where a woman employee was assigned to night work in a dangerous locality where she was likely to suffer injury from the criminal acts of persons who were not employees, but that case manifestly has no application here.

As the defendant was entitled for the reasons stated to a directed verdict and to the judgments non obstante veredicto for which it moved, the judgments appealed from will be reversed and the case will be remanded with direction to enter judgments for the defendant.

Reversed.

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of November 8, 1954, reversing the judgment of the District Court and remanding the cause, with instructions to enter final judgment for the defendant, upon the following grounds:

1. The decision of this Court was obviously predicated upon its conclusion that appellees "were not ordered or invited by the company to stand in the highway at the crossing." In reaching this conclusion it is respectfully submitted that this Court must have overlooked the evidence of record that appellees were ordered to meet at the crossing where the train stops and that the train customarily stopped at the highway crossing the tracks where appellees generally boarded same, as appears from the following evidence of record:

Cross Examination of Appellee Charles Bright

(Page 46 of Appellant's Appendix)

"Q. On the 28th. And Charles, didn't Mr. Hill, your foreman, tell you that they would like for you to go but you didn't have to go?

A. He told me to be at the crossing.

Q. He told you you had to go?

A. Yes, sir."

(Page 49 of Appellant's Appendix)

"Q. Where were you standing at the time you were hit?

A. In the road, in the crossing.

Q. In the cross road?

A. Yes, sir. • • •

Q. Were you standing out between the tracks?

A. No, sir, I was standing in the crossing.

Q. Well, I don't know just what you mean?

The COURT: Well, were you standing on the railroad tracks or in the road bed of the roadway?

The WITNESS: I was standing on the road.

The COURT: On the road?

The WITNESS: Yes, sir.

The COURT: Not on the railroad tracks?

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The WITNESS: On the railroad track. Just like the railroad. * * *

The COURT: In other words, you were standing where the road crosses the railroad?

The WITNESS: Yes, sir."

(Page 50 of Appellant's Appendix)

"Q. You could have stood up there if you had wanted to, couldn't you? It's all right for you to be there. You could have stood anywhere along there is what I'm asking.

A. According to where the train stops at. According to where to catch it at.

Q. Well, the train doesn't stop at that crossing, does it, where you were?

A. Sure it stops there.

Q. It does?

A. It catches me a many a time at the crossing."

2. The decision of this Court was also based upon its conclusion that *Lillie v. Thompson,* 332 U. S. 459, "has no application here." In reaching this conclusion it is respectfully submitted that this Court overlooked the principle announced by the Supreme Court that a defendant, under the Federal Employers' Liability Act, is liable for injuries to an employee resulting from the negligence of a third person, where the defendant is aware of conditions which create a liklihood that the employee would be injured by the act of the third person. And obviously a traveled highway crossing the tracks where there are no lights is a dangerous place on a dark night for anyone to wait for a train. Certainly the foreman of the defendant company who was present at the crossing and saw the appellees standing in the roadway knew or should have been aware of these conditions which would likely cause the appellees to be struck just as they were struck by the automobile of the third person, and the railroad failed in its duty to make reasonable provision against it.

3. This Court in reaching its conclusion that the defendant was not negligent apparently overlooked the incongruity of this conclusion with its conclusion that the appellees were standing in the highway at the crossing in

connection "with their employment in interstate commerce."

For the reasons set forth above and in the brief filed by appellees it is respectfully urged that a rehearing be granted, and that upon such rehearing, the judgment of the District Court be affirmed.

Respectfully submitted,

HENRY H. EDENS,

HENRY HAMMER,

JAMES P. HARRELSON,

Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,

HENRY HAMMER,

JAMES P. HARRELSON.

Attorneys for Petitioners.

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ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6813

ATLANTIC COAST LINE RAILROAD COMPANY,
APPELLANT,

versus

LEROY SMALLS, CHARLES BRIGHT, AND EVA G. MITCHEL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN MITCHEL, DECEASED, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.

This court having rendered its decision reversing the decision of the United States District Court for the Eastern District of South Carolina, and the appellees having on December 2, 1954, presented to the Court a petition for a hearing of said cause, and same having been fully considered:

It is now here ordered by this Court that the rehearing asked for be and same is hereby denied.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
ARMISTEAD M. DOBIE,
United States Circuit Judge.
WALTER E. HOFFMAN
United States District Judge.

FILED
Dec. 9, 1954
R. M. F. Williams, Jr.
Clerk

A true copy,
Teste:
Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for the
Fourth Circuit.